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# Supreme Court of The United States

October Term 1978

## No. 78-1268

GEORGE MARTINEZ, et al.,
Appellants,

vs.

THE STATE OF CALIFORNIA, et al.,
Respondents.

On Appeal From The Court Of Appeal
Of The State Of California,
Fourth Appellate District, Division One

# BRIEF AMICUS CURIAE OF THE STATE OF OHIO IN SUPPORT OF RESPONDENTS THE STATE OF CALIFORNIA, et al.

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## BRIEF AMICUS CURIAE OF THE STATE OF OHIO IN SUPPORT OF RESPONDENTS THE STATE OF CALIFORNIA, et al.

### INTEREST OF AMICUS

Pursuant to Supreme Court Rule 42 (4) the State of Ohio respectfully submits this brief amicus curiae in support of Respondent the State of California.

The State of Ohio submits that the questions presented in this action are of national importance and the decision rendered by this Court will have far reaching consequences for the States of this Union.

The State of Ohio maintains to this Court that the action commenced in the State of California failed

to meet the threshold requirement of 42 U.S.C. Section 1983, to wit: a deprivation of a Constitutional right without due process of law. The action below sets forth at best a state tort claim, far short of a cognizable constitutional violation.

Additionally, Amicus strongly urges that parole boards must be afforded absolute immunity for their decisions concerning the release of convicted individuals on parole. To afford parole board members a qualified immunity would fail to insulate these individuals from the threat of lawsuit concerning quasi-judicial decisions that inherently involve an unknown predictive question with few certainties.

In order to inform this Court of the State of Ohio's concerns in these areas of the law, this brief is submitted for the Court's consideration.

## STATEMENT OF THE CASE

Amicus hereby adopts the statement of the case set forth in the brief of the Respondents.

## OPINION BELOW

The opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division One, is reported at 85 Cal. App. 3d 430 (1978).



## ARGUMENT

### I. A WRONGFUL DEATH CLAIM BASED UPON THE UNLAWFUL ACTS OF A PERSON RELEASED FROM CUSTODY BY STATE OFFICIALS FAILS TO ALLEGE THE DEPRIVATION OF A CONSTITUTIONALLY PROTECTED RIGHT WITHOUT DUE PROCESS OF LAW

Amicus respectfully submits Appellants' federal civil rights claim fails to meet the threshold requirements of 42 U.S.C. Section 1983.

It is elementary in federal civil rights law that in order to properly make out a cause of action pursuant to 42 U.S.C. Section 1983 it must be alleged and shown that a person or persons acting under color of law deprived another of a right guaranteed by the U.S. Constitution and in violation of the U.S. Constitution. *Adickes v. S.H. Kress Co.*, 398 U.S. 144 (1970). This proposition consists of two elements: (1) that the defendant was acting under color of law; (2) that the defendant caused the plaintiff's civil rights to be violated. *Puckett v. Cox*, 456 F. 2d 233 (6th Cir. 1972).

Appellants' fifth claim alleged that Richard June-Jordan Thomas, a parolee, following his release kidnapped and murdered Mary Ellen Martinez. The complaint alleged the acts of the California Parole Board members in releasing this parolee were negligent and reckless. These acts were alleged to have deprived the decedent of life without due process of law in violation of 42 U.S.C. Section 1983.

Amicus respectfully submits the allegations as summarized immediately above do not meet the requirements of the aforementioned case law. It has not been

alleged nor can it be proven under the alleged facts that the decedent's civil rights were violated.

Appellants' complaint is based upon a theory that the Fourteenth Amendment to the U.S. Constitution guarantees citizens the right to be protected from dangerous persons held in the custody of a state institution and when state officials do not so protect citizens they have violated their Fourteenth Amendment rights. Amicus knows of no case law which would support this proposition.

Instead of basing their complaint upon an independent and specific constitutional right and the Respondents' violation thereof, appellants are left with an alleged Fourteenth Amendment violation from the fact that persons acting under color of law deprived decedent of her life. Thus, since the Fourteenth Amendment expressly states:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life liberty or property without due process of law; . . .

Appellants' complaint must equate the deprivation of life which has allegedly been caused by persons acting under color of law with a violation of due process. Under this theory, every time one acts under color of law so as to result in the death of another he has violated the Due Process Clause of the Fourteenth Amendment.

In a similar situation, this Court in *Paul v. Davis*, 424 U.S. 693 (1976), held that a defamation action in which the defendant was acting under color of law, did not rise to a constitutional tort level simply because it was committed with state action. In *Paul v. Davis*,



*supra*, the Chief of Police of Louisville, Ky., had authorized the circulation of flyers on which the plaintiff's name appeared as a shoplifter. Plaintiff, who had been arrested but not convicted on a shoplifting charge, subsequently brought a civil rights action for damages as well as declaratory and injunctive relief. Mr. Justice Rehnquist rejected the plaintiff's contention that his due process rights were violated in that the police chief's action deprived him of liberty. He stated:

> If respondent's view is to prevail a person arrested by law enforcement officers who announce that they believe such person to be responsible for a particular crime in order to calm the fears of an aroused populace, presumably obtains a claim against such officers under Section 1983. And since it is surely far more clear from the language of the Fourteenth Amendment that "life" is protected against state deprivation than it is that reputation is protected against state injury, it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle, would not have claims equally cognizable under Section 1983.
>
> It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under "color of law" establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shephered the adoption of that Amendment to learn that it worked such a result, and a study of our decisions convinces us they do not support the construction urged by respondent. 424 U.S. 693 at 698, 699.

He then analyzed several decisions in which the Court had previously held that due process was violated by

the government in the context of a situation where "liberty" was at stake. He concluded that in each of these cases due process was applicable because the right or status at stake had been recognized by either federal constitutional law [*Monroe v. Pape*, 365 U.S. 167 1961)] or state law [*Goss v. Lopez*, 419 U.S. 565 (1975); *Morrissey v. Brewer*, 408 U.S. 471 (1971); *Bell v. Burson*, 402 U.S. 535 (1971)]. Thus, without such an independent basis, the facts in *Paul* did not give rise to a constitutional tort.[1]

It cannot be argued that by virtue of the right to life having been determined in several contexts to be "fundamental" this makes out the requirements of the *Paul v. Davis*, *supra* test. Amicus would agree with appellants that because "life" expressly appears in the Fourteenth Amendment it is a recognized right. However, this alone does not satisfy this Court's test.[2] The independent basis which must be established by state, federal, or constitutional law which satisfies the test is dependent upon the relationships and duties at stake arising between the parties. As has been discussed above, there is no state, federal, or constitutional relationship which has been recognized and which arises between the general public and state institutional officials. The only such duties have arisen on the basis of public policy and create nothing more than a state tort action. See for example *Grimm v. Arizona Board*

[1] Most recently, this Court applied identical rationale in a false imprisonment damage action brought under the Federal Civil Rights Act against a county sheriff. *Baker v. McCollan*, —— U.S. ——, 47 U.S. L.W. 4823. (Decided June 26, 1979).

[2] For instance, in *Parham v. Hughes*, —— U.S. ——, 60 L. Ed. 2d 269, 279, f.n. 11 (1979), this Court indicated that a statutory entitlement to sue for the wrongful death of another is not itself a fundamental or constitutional right.



*of Pardons and Paroles*, 115 Ariz. 260, 564 P. 2d 1227 (1977). Thus, appellants' complaint fails to meet the requirements of 42 U.S.C. Section 1983.

## II. PAROLE BOARD OFFICIALS HAVE AN ABSOLUTE IMMUNITY FOR THEIR QUASI-JUDICIAL DECISIONS CONCERNING THE RELEASE OF CONVICTED INDIVIDUALS ON PAROLE.

Should this Court determine that the complaint states a cause of action cognizable under the Federal Civil Rights Act Amicus submits Respondents are absolutely immune from liability for their quasi-judicial decisions. To arrive at this conclusion an analysis of the role and function state parole boards perform in our judicial systems is necessary.

To be sure, individuals serving on the parole board are members of the Executive Branch of State Government, but this is not dispositive of the issue presented. This Court has recently held in *Butz v. Economou*, 438 U.S. 478 (1978), that a functional analysis of the judgments made must be undertaken to determine whether to label a governmental function judicial or executive.

> "It is the functional comparability of their judgments to those of the judge that has resulted in both grand jurors and prosecutors being referred to as 'quasi-judicial' officers, and their immunities being termed 'quasi-judicial' as well." *Imbler v. Pachtman*, 424 US, at 423 n 20, 47 L Ed 2d 128, 96 S Ct 984. *Butz v. Economou*, 438 U.S. at 512.

Appellants choose to avoid this analysis and instead prefer to rely upon authorities involving executive officials performing executive functions. *Wood v.*

*Strickland*, 420 U.S. 308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974). As noted above, this approach ignores the special function of the parole board in the release decision making process.

As this Court has most recently recognized in *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, —— U.S. ——— 47 U.S. L.W. 4581 (1979):

> The parole release decision, however, is more subtle and depends on an amalgam of elements, some of which are factual but many of which are purely subjective appraisals by the Board members based upon their experience with the difficult and sensitive task of evaluating the advisability of parole release. Unlike the revocation decision, there is no set of facts which, if shown, mandate a decision favorable to the individual. The parole determination, like a prisoner transfer decision, may be made 'for a variety of reasons and often involve no more than informed predictions as to what would best serve [correctional purposes] or the safety and welfare of the inmate.' *Meachum v. Fano, supra*, at 225. The decision turns on a 'discretary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done.' Kadish, The Advocate and the Expert-Counsel in the Peno-Correctional Process, 45 Minn. L. Rev. 803, 813 (1961). *Greenholtz v. Inmates, supra*, at 4583.

Moreover, the parole release decision is identical to the decision a judge must make when asked to release a convicted individual on probation.

Both the Court and parole board are deciding whether a convicted individual will serve his lawful sentence to completion. Certainly both are concerned with the safety of society and the benefits to the convicted person seeking this early release.



To follow the reasoning advanced by appellants would leave judges with at best a qualified immunity for decisions relating to probation. This result could only be contrary to this Court's holding in *Imbler v. Pachtman*, 424 U.S. 409 (1976), *Butz v. Economou, supra* and *Bradley v. Fisher*, 13 Wall (80 US) 335, 20 L. Ed. 646 (1872).

One would be hard pressed to theorize that a judge reaches a probation release decision utilizing a totally different thought process than the parole board uses when presented with a parole release decision. Both considerations involve the welfare of the public and the affected convicted individual. In summary, the judgment exercised is the same in both instances.

In addition, this Court has held that the decision whether to revoke parole or probation must be accomplished in similar constitutional fashion. *Morrissey v. Brewer, supra, Gagnon v. Scarpelli*, 411 U.S. 778 (1973). It is submitted that the need to treat the two statuses equally prior to revocation, is strong evidence that the same factors and considerations were involved during the release determination phase.

This Court has often stated that there are few doctrines more settled than the immunity of judges from liability for damages within their judicial jurisdiction. *Pierson v. Ray*, 386 U.S. 547, 554 (1967); *Imbler v. Pachtman, supra; Butz v. Economou, supra.* The enunciation of this doctrine in *Bradley v. Fisher, supra*, stemmed from the realization that judges must be free to exercise their discretion and judgment insulated from outside pressures. This is true despite the possibility such actions or decisions would or might stem from an improper motive.

Absolute immunity has been afforded to others connected with the judicial process as well. Grand jurors,

petit jurors, advocates and witnesses *Yaselli v. Goff*, 275 U.S. 503, 72 L. Ed. 395, 48 S. Ct. 155 (1927), *affg. mem.* 12 F. 2d 396 (2nd Cir. 1926); *Imbler v. Pachtman, supra* are absolutely immune from damages also. The reasoning behind these decisions remain the same; insulation from harassment by lawsuit and insurance that the decision will be based upon reason not fright.

This doctrine, as this Court is well aware, is not new. It existed during the formative years of our country. See 1 W Hawkins, Pleas of the Crown, 349 (6th Ed. 1787) quoted in *Yaselli v. Goff, supra* at 403. As noted above this Court adopted it in *Bradley v. Fisher, supra* in 1872.

This Court is now faced with a decision that concerns our American parole system which this Court has properly noted is in its formative years. *Greenholtz v. Inmates, supra*, 47 U.S. L.W. at 4583. To follow the course proposed by appellants might well spell the end for the parole system still in its "experimental stages". Their position fails to perceive the need for a parole system and, most importantly fails to consider the enormous pressures such systems experience.

As noted above, this Court has found the parole decision making process to be a product of assessing imponderables and acting upon that assessment. *Greenholtz v. Inmates, supra.* Inheritant in such a system must be the right to be wrong. The entire process lacks clear scientific laws and precise measurements. Rather the system depends entirely on subjective evaluations utilizing the judgments of individuals that bring with them their experiences in life and the hope that their predictions are correct. Experience has taught us that often these predictions are not always correct.



In Ohio the inmate population is approximately 13,600 and the seven member parole board hears 11,161 number of applications per year. They granted 5346 paroles with 1048 parolees being returned in 1978 to the correctional system.[3] To hold each parole board member liable in damages for his predictive judgment, with the given fact that approximately 19.6 percent of Ohio's parolees will return, is a burden too onerous to impose upon any individual.

It is asserted that the position expounded herein is not without authority among the Circuit Courts of Appeal and the District Courts. See *Bricker v. Michigan Board of Parole*, 405 F. Supp. 1340, 1345 (E.D. Mich. 1975); *Pate v. Alabama Board of Pardons and Parole*, 409 F. Supp. 478, (M.D. Ala. 1976); *affd.* 548 F. 2d 354 (5th Cir. 1977); *Ammlung v. City of Chester*, 355 F. Supp. 1300 (W.D. Pa. 1973) citing *Pierson v. Ray*, 386 U.S. 547 (1967), *affd.* 494 F. 2d 811 (3rd Cir. 1974); *Pennebaker v. Chamber*, 437 F. 2d 66 (3rd Cir., 1970); *Winterhalter v. Three Rivers Motor Co.*, 313 F. Supp. 962 (W.D. Pa. 1970); *Pope v. Chew* 521 F. 2d 400, 405 (4th Cir. 1975); *Silver v. Dickson*, 403 F. 2d 642 (9th Cir. 1968), *cert. denied*, 394 U.S. 990 (1968); *McCray v. State of Maryland*, 456 F. 2d 1 (4th Cir. 1972). This is not to say that these Courts have correctly foretold how this Court will reach its decision, but it is strongly urged that it does evidence the concern these Courts had for parole board members exercising parole release decisions and the analysis these Courts have made concerning the nature of the parole release decision. It is submitted that there is a need to afford absolute immunity from liability to parole board mem-

[3] Statistics from Ohio's Division of Parole and Community Services Annual Report, Tables I, II, III, pp. 20, 21, 22.

bers concerning parole release decisions; a need firmly grounded upon law and sound public policy. *Butz v. Economou, supra.*

## CONCLUSION

Appellants have failed to pass the threshold test necessary in all actions filed pursuant to 42 U.S.C. Section 1983. This action presents no deprivation of a constitutional right without due process of law. *Paul v. Davis, supra.*

Lastly, the members of a parole board must be absolutely immune from liability for parole release decisions in order that their quasi-judicial decisons may be made in an atmosphere free from all outside influences. *Imbler v. Pachtman, supra; Butz v. Economou, supra.*

Therefore, this Court should affirm the decision of the California Court of Appeals.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that I have served three (3) copies of this Brief of Amicus Curiae upon counsel of record for the Respondent, Honorable Jeffrey T. Miller, Deputy Attorney General, State of California, 110 West A-Suite 600, San Diego, California 92101, counsel for Appellants, Donald McGrath II, Suite 1405, 1200 3rd Avenue, San Diego, California, 92101, and one copy to counsel for Amicus Curiae, Americans for Effective Law Enforcement, Inc., Frank Carrington, 4530 Oceanfront, Virginia Beach, Virginia, 23451, counsel for Amicus Curiae, Pacific Legal Foundation, Ronald Zambrun, 455 Capital Mall, Suite 465, Sacramento, California 95814, pursuant to the requirements of Rule 33 of the Rules of the Supreme Court of the United States, by depositing same in a United States mail box, with first class postage prepaid, addressed to all counsel of record as set forth above, on or before August 20, 1979.

I further certify that I am a member of the bar of this Court, and that all parties required to be served have been served on or before August 20, 1979.

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